

Temperance Kirby, Executrix }
of Dame Jane Ormsby. } Appellant.

Appeal from the Exchequer
of Ireland.

Gilbert Ormsby Esq; Respondent.

The Respondent's C A S E.

Robert Ormsby Esq; had Issue Edward his Eldest Son (afterwards Sir Edward) and Gilbert the Respondent. Upon a Treaty for Marriage to be had between the said Edward and Jane Murray (the Testatrix of the Appellant) Daughter of David Murray Esq; the Portion of the said Jane was represented, and articulated to be 3500 l. (but great part of it consisting in a Debt due from King Charles the first, only 800 l. of it was really received.) However the Marriage took Effect, and Settlements were perfected, whereby the Lands of the said Robert in the County of Limerick were settled on Edward for his present Maintenance, and on the said Jane for her Jointure, with Remainders to the Issues Male of the Marriage, with Remainder over to the Respondent for Life, and to his several Sons in Taile Male.

At the time of the Settlement the Lands were under Leases for Lives, and Years determinable upon Lives, with Provision for Renewal, to Thomas Bently, Mark Harrison, and Richard Plummer. Robert Ormsby died Anno 1664. and Sir Edward entred and confirmed the Leases then in being; and afterwards (his Wife joining with him) renewed Plummer's Lease for three Lives at 107 l. per Annum, Harrison's at 25 l. per Annum, and the Rent of Bently's was 150 l. per Annum; so that the whole Jointure-Lands yielded but 282 l. per Annum.

Bently and Harrison being backward Tenants, and committing Waste, to punish which (as the Settlement stood) no Action lay at Law, Sir Edward being desirous to be rid of them, proposed to the Respondent (whose Interest it was to preserve the Estate from being destroyed, (Sir Edward having no Issue, nor a Prospect of any) that he would purchase in their Interest, and become Tenant to their Farms at the same Rent, and that Leases should be made to him accordingly. The Respondent did purchase in their Interest, and then, at the Request of the said Sir Edward and Dame Jane, the Respondent in 1678. contracted to make a Lease of Bently's and Harrison's Farms (with 300 Acres of his own Estate which lay contiguous to them) to Thaddy Quin Gentleman, for 1000 Years, at the Rent of 230 l. per Annum, above Quit-rent and Taxes; and Quin thereupon entred, and continued Tenant from 1678. till 1684. when Sir Edward died. After Sir Edward's Death, there being no Fine levied, Dame Jane (who she had insisted upon a Present of a Pair of Coach-Horses for her Consent to the said Lease, and had them from Quin) attempted to avoid the Leases, and turn the Tenants out of Possession. But to accommodate all Differences, and prevent Law-Suits, the Respondent did agree to accept a Lease from the said Dame Jane of all her Joynture-Lands, at 300 l. per Annum, payable at Dublin; which was perfected accordingly, in which there was a Nomine poena of 20 s. a Week when the Rent should be behind; and the Respondent gave a Bond of 1000 l. for Performance of the Covenants of the Lease. This Bargain was so far from being a beneficial one on the part of the Respondent, that deducting the Expence of Receiving and Paying the Rent in Dublin, which was 25 l. per Annum, and Chief Rent 5 l. per Annum payable to the Earl of Kildare, 12 l. was all that remained to the Respondent for his own 300 Acres of Land, (worth 50 l. per Annum) and for his Trouble, and subjecting himself to the Rent and Covenants of the Lease, accepted by him from the Joyntress.

The Respondent punctually paid the said Rent till the first of May, 1688. inclusive, and before the November following the Condition of Ireland was such, That no Protestant Subject could make any Benefit of his Lands; but in the Month of December the Respondent, with his Family, left his Estate, and fled into England; in the May following King James arrived in Ireland, and the Respondent was by the Parliament held under King James, attainted; his real Estate (being 1600 l. per Annum) and a personal Estate, of more then the Value of 6000 l. seized for the said Kings Use, and Plummer the Under-Tenant taken Prisoner, plundered, and ruined, and under King James his Act of Repeal of the Act of Settlement, the old Proprietors entered on the Joynture Estate.

The County of Limerick, where the Joynture-Lands lay, was one of the earliest in the Kingdom where the Protestants were disturbed, and the last that was reduced; and these Lands particularly suffered more than others in that County, being a Thorough Fare from Limerick to Kerry.

Dame Jane Ormsby dyd about October, 1691. and made the Appellant her Executrix.

The Appellant in 1692, impowered John Lowther Esq; to demand the Arrears claimed to be due at Lady Ormsby's Death, and to make what Agreement about it he thought fit. A Reference thereupon was, to Sir Richard Leving, and Robert Rotchfort Esq; who delivered their Opinions (but did not make it a Conclusive Award) that 150 l. should be paid Mr. Lowther, for the use of the Appellant, for the half Years Rent due November 1688. and no more; but that the Appellant should be at her Liberty to distrain, or receive, what she could from the Under-Tenants, either in her own or in the Respondent's Name. Accordingly, the Respondent did forthwith lodge the 150 l. in the Hands of Mr. Benjamin Burton, a Banker in Dublin, for the Appellant's use, and tendered it to Mr. Lowther, for her; and this long before she had proved the Will of her Testatrix, and consequently before she was by Law intitled to recover it against the Respondent, altho' she might justifiably receive it, (being offered to be paid) and give a legal Discharge for it.

Mr. Lowther, by Directions from the Appellant, refused to accept of the Money, and a Suit was commenced against the Respondent in the Name of the Appellant, upon the Bond of 1000 l. entered into by him for the Performance of the Covenants of the said Lease.

Thereupon in Michaelmas Term, 1699, the Respondent exhibited his Bill in the Court of Exchequer in Ireland against the Appellant, setting forth his own, and his Under-Tenants Sufferings, by the general Calamities of the Times, praying Relief against the said Penalty, and such Abatements as were usual and reasonable to be given to Tenants in like Cases, where they could make no Benefit of the Lands out of which the Rent was to Issue.

The Appellant in her Answer admitted the Respondent's Troubles and Losses, and the Sufferings and Ruine of Plummer, the Under-Tenant; but insisted that Quin being a Papist, had not suffered, and therefore his Rent ought to be answered to her; she admitted the Power given by her to Mr. Lowther, the proposal abovementioned, and that she refused to accept of the 150 l. resolving to rely on her Remedy at Law, to recover the whole Arrears. Upon sight of what she insisted upon, the Respondent sued Quin, to bring him to an Account for the Rent during the time he Enjoyed the Estate, who exhibited his Bill against the Respondent to be relieved, and after the Examination of divers Witnesses, both Causes came on to be heard together, before the Chancellor, and the three Barons of the Exchequer, where, upon the Proofs made by Quin of his Losses and Sufferings, (notwithstanding his being a Papist) by the common Calamity of the Kingdom, the whole Court did unanimously decree, that the Respondent should immediately pay the Appellant 150 l. and her Costs at Law, and upon Payment thereof the Lease and Bond to be delivered up, and a perpetual Injunction against the Suit at Law, and an intire Abatement to be in both Causes from all Arrears from November 1688. to the Death of the Lady Ormsby, and Quin to have a Decree for his Lease, and to be without Costs on either side in Equity; by which Decree Quin was discharged of half a Years Rent against the Respondent, more then the Respondent was discharged against the Appellant.

Before the Decree could be made up, the Respondent was served with your Lordships Order upon the Appellant's Petition, and Appeal; and so the matter stands in Ireland.

In the Appeal it is insisted on, That altho' to colour the Hardships on the Appellant, all Arrears are remitted to Quin from November 1688, to Lady Ormsby's Death, yet the Respondent voluntarily made Quin an allowance of 715 l. afterwards; and further that 'tis in Proof, that Quin made considerable Profits during the Lady's Life, and has an Advantageous Lease decreed him, without Consideration; and that the Appellant's and Respondent's Case greatly differ in Circumstances, as to Arrears; and complains, that the Court have not allowed her Interest for the 150 l. and Costs of that Court.

But the Respondent humbly hopes the said Decree is well grounded in it self, and agreeable to Equity and Justice, and particularly to the constant settled Rules, and Practice of Ireland, for the Reasons following, viz.

I. For that it is fully proved, that the Troubles began in the County of Limerick in December 1688. and continued during the War, and the Under-Tenant Plummer was utterly ruined, and lost all he had; and neither he nor the Respondent Enjoyed, or could Enjoy, or make any Rent (and if they had, must have receiv'd their Rent in brass Money.) And tho' Quin did Enjoy some time in the War, yet he has fully proved, that King James his Commissioners levied all the Rent, and a great deal more; and that he lost all his Stock, and Improvements, to near 5000 l. Value, by following the Protestant Party.

II. That the Abatement made is usual, and according to the General rule of the Kingdom; and tho' the Respondent, after the Troubles ended, found himself obliged to make allowances, for putting the Estate into Condition again, (as other Landlords there have been forced to do) that makes his Case harder, but does not favour or concern the Appellants Claim: For that Abatement was given for the Rent that fell due only after the Lady Ormsby's Death; and there is no Proof or Pretence, of the Respondents receiving one Penny of Quin from November 1688. till November 1691. but 50 l. in Brass Money.

III. There can be no Reason for Interest or Costs, it being the Appellant's own Fault she received not the 150 l. when so often offered, or tendered, and deposited for her, and that too, before she had any Right of Action attached in her; so that there can be no pretence of her having been delayed of her Due one Minute; but her Delay of having the Money was due only to her self. Besides the Respondent insists, That Allowance of Interest for Rent, either upon Bonds for Performance of Covenants, or Nomine Poena, is against the General Rule of the Kingdom, and many Adjudged Cases, and would breed all imaginable Confusion, in regard Interest is so very high there, and the Kingdom subject to such frequent Revolutions and Disturbances. In the Rebellion in 1641. no Interest was allowed in Ireland even upon Bonds and Judgments, for Money lent from 1641, to 1654. and from 1654, to 1656. (tho' the Kingdom was intirely reduced) only Half Interest was allowed.

Note, The Act of Resumption clears all Interest and Rent during the War, which is declar'd not to determine till Easter 1692. And the King had no Quit-Rents till Mich. 1692.

IV. This was a Decree solemnly pronounced by a full Court, by Men of known Abilities, well acquainted with the Circumstances of the Kingdom, and of the several parts of it where the Burthen lay most heavy, after a full Examination; so that the Judges (who were Unanimous in this Decree) were well qualified to ascertain what Allowance was fit and reasonable to be made: And the Shaking of this Decree, will in effect at once unsettle the whole

Kingdom, and put all again into Confusion.

Therefore the Respondent humbly hopes, your Lordships will affirm the said Decree, and dismiss the Appeal with Costs.

St. John Brodrick.